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Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Commercial Energies, Inc.

**File:** B-243616

**Date:** August 15, 1991

G. Kellam Scott, Esq., for the protester, Chidi N. Anunka for Ebersen, Inc.; J. Abel Godines for Krystal Gas Marketing Company; Mariette Naughton for Naughton Energy; Don A. Nichols for R & D Energy Resources; and Judy K. Stewart for Union Natural Gas Pipeline Company, interested parties. Gregory Zagorin, Esq., Defense Logistics Agency, for the agency.

Robert A. Spiegel, Esq., and John G. Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest of a decision not to set a solicitation aside for small disadvantaged businesses (SDB) is denied where agency reasonably determined that it would not receive offers from at least two responsible SDBs.
2. Agency is not required to apply evaluation preference for small disadvantaged businesses to contract price elements which are not evaluation factors for award.
3. Evaluation preference for small disadvantaged businesses is authorized by statute governing the obligation of Department of Defense (DOD) funds only and, therefore, should not be used in evaluation items which are to be acquired with non-DOD funds.
4. Agency did not act improperly by using an economic price adjustment clause with two alternate price ceilings where the agency determined that the clause was necessary to protect the government against undue price increases.

### DECISION

Commercial Energies, Inc. (CEI) protests the terms of request for proposals (RFP) No. DLA600-91-R-0072, which was issued as a partial small business set-aside by the Defense Logistics Agency (DLA), for the supply of natural gas to 27 military and civilian installations in Arizona, California, Colorado, Nevada, Oregon, and Washington. CEI principally

argues; (1) that DLA was required to set aside the procurement for small and disadvantaged businesses (SDBs); (2) that DLA failed to properly extend an SDB cost preference under Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 219.7001 to all price factors and all locations; (3) that DLA improperly incorporated an economic price adjustment (EPA) clause, including ceiling prices in the fixed-price contract; and (4) that DLA improperly synopsisized the procurement by using the wrong classification notice in the Commerce Business Daily (CBD).<sup>1/</sup>

We dismiss the protest in part and deny it in part.

On March 25, 1991, the RFP was issued contemplating a fixed-price requirements contract with an EPA clause that contained two alternative ceiling prices. Four line items were set aside for small businesses while the balance of the procurement was unrestricted. The solicitation provided that item-by-item award for various locations would be made to the responsible offeror whose proposal offered the lowest "total adjustment factor" which was defined as the sum of a "supply adjustment factor" and a "transportation adjustment factor" -- the only price elements listed which could vary among the competitors.<sup>2/</sup> Also the RFP provided that a 10-percent SDB preference will be applied to the total adjustment factor only at Department of Defense (DOD) locations. Finally, the RFP stated that the Walsh-Healey Public Contracts Act,

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<sup>1/</sup> The protester raised other issues in its initial protest which concern such matters as DLA's refusal to provide certain information about various evaluation factors, installations, and tariffs, and that the agency had dealt in bad faith with SDBs throughout the procurement process. DLA responded to these allegations in its agency report on the protest, and CEI did not rebut those issues in its comments on that report. Therefore, we dismiss these allegations as abandoned. Anderson-Elerding Travel Serv., B-238527.3, Dec. 19, 1990, 90-2 CPD ¶ 500.

<sup>2/</sup> Line item contract prices also include other elements common to all offerors which DLA refers to as "pass-through items" and which are not part of the comparative evaluation: a "supply index price," a "transport index price" and a "transport fuel factor." These elements are controlled by a market index published by the Federal Energy Regulatory Commission (FERC) or locally applicable pipeline tariffs outside the control of offerors.

41 U.S.C. § 35 et seq. (1988), was applicable.<sup>3/</sup> Notice of the procurement was published under Classification Code 68, Chemicals and Chemical Products, in the January 11, 1991, issue of the CBD.

#### THE SDB SET-ASIDE

CEI claims that this procurement should have been set aside for performance by SDBs. In this regard, DFARS § 219.502-72(a) provides that a procurement shall be set aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that: (1) offers will be obtained from at least two responsible SDB concerns; and (2) award will be made at a price not exceeding the fair market price by more than 10 percent. Since the decision to set aside a particular procurement for SDBs is a business judgment within the discretion of the contracting officer, our Office will not question such a determination unless we find that the contracting officer abused her discretion. Commercial Energies, Inc., B-234789, July 12, 1989, 89-2 CPD ¶ 40.

CEI contends that the contracting officer was required to set aside this procurement for SDBs because there was a reasonable expectation that offers would be obtained from at least two responsible SDBs. Besides itself, CEI specifically identifies Krystal Gas Marketing, SDS Petroleum, and Union Natural Gas Pipeline as SDBs that are currently engaged in the selling of natural gas. According to the protester, all of these firms would be interested in competing for this procurement were it set aside for SDBs.

The contracting officer conducted an investigation for the purpose of identifying potential SDB sources of supply for each of the line items listed in the solicitation. That investigation included a distribution of applications to approximately 300 prospective suppliers and a survey of the capabilities of firms who have supplied natural gas to the agency. The contracting officer considered Krystal to be the only responsible SDB source which was also a regular dealer in natural gas among the 38 SDBs which were identified. The contracting officer concluded that SDS Petroleum and Union Gas were not responsible due to their recent failures on preaward surveys under other solicitations for natural gas. She also could not determine that CEI was a regular dealer in natural gas as required by the solicitation and doubted the firm's capacity to be a shipper of natural gas. In this regard, not

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<sup>3/</sup> The Walsh-Healey Act requires that contracts for supplies be awarded only to manufacturers or regular dealers. See Federal Acquisition Regulation (FAR) § 22.602.

only was CEI absent from FERC's current list of natural gas transporters; but the firm neither responded to the contracting officer's request for storage and pipeline information nor submitted a form which would have indicated its compliance with the Walsh-Healey Act. Thus, the contracting officer decided against setting aside this procurement for SDBs because she was ultimately unable to identify more than one responsible SDB who qualified as a manufacturer or a regular dealer under Walsh-Healey.

CEI does not specifically take issue with the agency's report of its investigative efforts other than to insist that it and Krystal Gas are responsible SDB sources. The record here indicates that the agency undertook reasonable efforts to identify suitable SDB firms and we see nothing which contradicts any of the agency's findings. Therefore, we have no basis to disturb the contracting agency's decision not to set aside the RFP for SDBs. Commercial Energies, Inc., B-234789, supra.

#### THE SDB PREFERENCE--EVALUATION FACTORS

CEI essentially argues that DLA improperly limited the application of the 10-percent preference for SDBs under DFARS § 219.7001 to the total adjustment factor and did not apply it to the three other factors which are part of the contract price. We have previously upheld virtually identical evaluation formulas under which the SDB preference was applied solely to those price factors which constitute the bases for award. Commercial Energies, Inc., B-243402, July 30, 1991, 91-2 CPD ¶ 102; Hudson Bay Natural Gas Corp., 69 Comp. Gen. 233 (1990), 90-1 CPD ¶ 151, aff'd Hudson Bay Natural Gas Corp.--Recon., B-237264.2, Apr. 18, 1990, 90-1 CPD ¶ 397; SDS Petroleum Prods., B-239534, Aug. 28, 1990, 90-2 CPD ¶ 164. The courts have also upheld evaluation formulas which are virtually identical to the one in question here. Commercial Energies v. United States, 20 Cl. Ct. 140 (1990), aff'd 929 F.2d 682 (Fed. Cir. 1991). We find no merit to CEI's position in this protest.

#### THE SDB PREFERENCE--CIVILIAN ACTIVITIES

CEI also asserts that pursuant to DFARS § 219.7001, DLA does not have the authority to exclude RFP items involving non-DOD locations from the application of the SDB preference. We do not agree. Statutory provisions governing DOD apply only to those items involving obligation of DOD funds and do not extend to items involving the obligation of other agencies' funds. See Wilde Tool Co., Inc., 63 Comp. Gen. 325 (1984), 84-1 CPD ¶ 245; Idealspaten, GmbH, B-205323, Apr. 27, 1982, 82-1 CPD ¶ 389; Procurement of Stainless Steel Flatware, B-186422, Oct. 26, 1976, 76-2 CPD ¶ 364. Here, as the agency

points out, only DOD is authorized to pay a preference for SDBs by language first contained in the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-61, § 1207, 100 Stat. 3816 (1986) (which has subsequently been extended throughout successive fiscal years). Since, as DLA explains, natural gas for non-DOD locations is not funded by DOD appropriations, we have no basis to object to the application of the SDB evaluation preference only to the items funded by DOD. Commercial Energies, Inc., B-243402, supra.

#### ECONOMIC PRICE ADJUSTMENT

CEI argues that it was improper for DLA to use an EPA clause, which provides in the alternative: (1) that the total delivered unit price of the gas cannot exceed by 75 percent the unit price at the time of award; or (2) that the price ceiling of each installation shall be 100 percent of the applicable local distribution price for the gas in a fixed-price contract which is awarded on the basis of "total delivered price."


The regulations provide for the inclusion of an EPA clause in a fixed-price contract (which may include a price ceiling) for supplies, like natural gas, that have an established market price if, as here, the contracting officer determines that "it is necessary to protect the contractor and the government against significant fluctuations in . . . material costs. . . ." See FAR § 16.203-4. While the protester clearly objects to the use of the two ceilings, it has not in our view provided a coherent reason for its objections. The agency explains that the first ceiling is to protect against undue increases in the market price of gas and the other is to make sure that the government does not pay more under the contract than it would have to pay if the gas were supplied by a utility company. Both reasons make sense to us and we therefore have no legal basis upon which to object to the EPA clause.

#### CBD SYNOPSIS

CEI finally complains that DLA's synopsis of this procurement was placed under the wrong classification code when published in the CBD. Since the protester submitted a timely proposal under the RFP and does not otherwise argue that it was in any

way prejudiced by the allegedly defective notice, we find no merit to this argument. Eastman Kodak Co.--Recon., B-228306.2, Feb. 25, 1988, 88-1 CPD ¶ 191.

The protest is dismissed in part and denied in part.

  
for James F. Hinchman  
General Counsel